

1 STATE OF MONTANA  
2 BEFORE THE BOARD OF PERSONNEL APPEALS

3 IN THE MATTER OF UNPAID LABOR PRACTICE CHARGES NO. 31 & 37-791  
4 MONTANA PUBLIC EMPLOYEES  
5 ASSOCIATION, INC.,

6 Complainant.

7 - VS -

FINAL ORDER

8 GEORGIA RUTH RICE, OFFICE  
9 OF SUPERINTENDENT OF PUBLIC  
INSTRUCTION,

10 Defendant.

11 \* \* \* \* \*

12 The Findings of Fact, Conclusions of Law and Recommended  
13 Order were issued by Hearing Examiner Jack H. Calhoun on  
14 April 14, 1980.

15 Exceptions to the Findings of Fact, Conclusions of Law  
16 and Recommended Order were filed by Ross W. Cannon and Richard L.  
17 Parish, Attorneys for Defendant, on May 5, 1980.

18 After reviewing the record and considering the briefs  
19 and oral arguments, the Board orders as follows:

20 1. IT IS ORDERED, that the Exceptions of Defendant to the  
21 Hearing Examiner's Findings of Fact, Conclusions of Law and  
22 Recommended Order are hereby denied.

23 2. IT IS ORDERED, that this Board therefore adopts the  
24 Findings of Fact, Conclusions of Law and Recommended Order of  
25 Hearing Examiner Jack H. Calhoun as the Final Order of this  
26 Board.

27 DATED this 8<sup>th</sup> day of August, 1980.

28 BOARD OF PERSONNEL APPEALS

29  
30 By Brent Crowley  
31 Chairman

32 cc: Richard L. Parish  
Barry L. Hjort  
Thomas Schneider

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2 STATE OF MONTANA  
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4 IN THE MATTER OF UNFAIR LABOR PRACTICE CHARGES NO. 31 AND 37-79;

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2        "ARTICLE TEN. JOB SECURITY Section 1. The employee  
3 shall experience a probationary period of six months from  
4 the date of hire with the Employer. During the six months  
5 of probation, an employee may be terminated by the Employer  
6 when, in the judgment of the Employer, the employee's perform-  
7 ance does not meet the required standards. The Employer  
8 will present to the employee and to the Association a written  
9 notice, by certified mail, stating the reasons for such  
10 termination.

11        Section 2. The Employer may remove an employee with perma-  
12 nent status only for just cause. The Employer shall furnish  
13 the Employee and the Association a notice, by certified  
14 mail, stating the reasons for such termination. Any disci-  
15 plinary action taken by the Employer may be processed  
16 through the grievance procedure."

17        2. Defendant refused to negotiate on the proposal:

18                  IV. OPINION

19        Although the question presented here has not been considered  
20 before by the Montana Board of Personnel Appeals, it was decided  
21 several years ago by the National Labor Relations Board. Discharge  
22 has long been recognized as a mandatory subject of bargaining by  
23 the NLRB. National Licorice Co. v. NLRB, 309 U.S. 350 (1940), 6  
24 LRRM 674. The Montana Supreme Court in State Department of High-  
25 ways v. Public Employees Craft Council, 165 Mont. 349, 529 P. 2d  
26 785 (1974), 87 LRRM 2101 held that private sector precedents are  
27 relevant in interpreting our act when its language and that of  
28 the Labor Management Relations Act are similar. The two acts are  
29 similar in the language they use to provide employees the right  
30 to bargain collectively with respect to wages, hours and other  
31 conditions of employment. The term "other conditions of employ-  
32 ment" encompasses most aspects of the employer/union relationship.  
The requirements of continued employment for one already on the

1 job are literally "conditions of employment" about which both  
2 parties must bargain. The employer may not set unilaterally - or  
3 bargain directly with individual employees about - the allowable  
4 causes of discharge and the manner in which employer decisions on  
5 discharge may be reviewed through a grievance procedure. See  
6 Labor Law, Basic Text, by Robert A. Gorman, 1976 ed., pp. 504.  
7 Professor Morris in The Developing Labor Law, 1971 ed., at page  
8 404 states, "Numerous topics fall within 'other terms and con-  
9 ditions of employment' as the phrase is used in the Act. Many  
10 are now so clearly recognized to be mandatory subjects for bar-  
11 gaining that no discussion is required. Among these topics are  
12 provisions for a grievance procedure and arbitration, layoffs,  
13 discharge, . . ." It seems to be well settled in the private  
14 sector that there is a duty to bargain in good faith concerning  
15 whether the employer or the union or both will determine how and  
16 what working conditions will be during the term of the labor  
17 contract. With that proposition Defendant does not argue.

18 The position of Defendant in this matter is that it is not  
19 within the legal authority of her office to confer tenure upon  
20 her employees; that, in fact, it is an illegal subject for bar-  
21 gaining. To support that position a number of cases are cited by  
22 Defendant and she refers to certain action by the 1977 Legisla-  
23 ture. First, the Legislature defeated a bill which would have  
24 created a civil service system for state employees and, at the  
25 same time would have given tenure to them. From this Defendant  
26 believes legislative intent should be extracted and a conclusion  
27 drawn that bargained for tenure by employees covered by the Col-  
28 lective Bargaining for Public Employees Act is against public  
29 policy. I do not agree. There may have been myriad reasons why  
30 a civil service system bill was not passed, not the least of  
31 which may have been that employees, through their exclusive  
32 representatives, were already able to obtain via collective  
33 bargaining many, and perhaps even more, of the benefits which

such a system could bestow. The Montana Act is modeled so closely after the MERA that the Legislature could hardly have been ignorant in 1973 of the fact that the private sector had been bargaining over termination for cause (tenure) for years, and that the industries with strong and stable labor relations histories do not summarily dismiss bargaining unit numbers. Had the 1977 Legislature intended that public employers not bargain on the subject, it would not have passed the Act.

Secondly, Benner et al. v. Georgia Ruth Rice, Civil Action No. 41041, First Judicial District Court (April 27, 1978), was cited to suggest that a decision, by Judge Bennett, that a previous Superintendent lacked authority to adopt an affirmative action plan giving tenure to employees should be conclusive here. Judge Bennett was not addressing public employee rights and public employer responsibilities under Montana's Collective Bargaining for Public Employees Act when he decided Beamer.

Zderick v. Silver Bow County, 154 Mont. 110, 460 P.2d 749 (1969) was decided several years before the Collective Bargaining for Public Employees Act was enacted in 1973. The new law gave public employers the authority and imposed the duty upon them to bargain on wages, hours, fringe benefits and other conditions of employment. To imply there was no authority conferred by the statute would simply be illogical. Finally, Defendant urges that Sibert v. Community College of Flathead County, \_\_\_ Mont. \_\_\_, 587 P. 2d 26, 35 St. Rep. 1780 (1978) resolves the issue with certainty. I believe the distinction between Sibert and this case is that the College Trustees were attempting to give tenure to administrative persons - persons who clearly would not be covered by the collective bargaining law, but rather, those who are specifically excluded as management officials and/or supervisory personnel. Sibert did not answer the question of whether non-administrative, non-management personnel could be contracted with for termination for cause.

None of the arguments made by Defendant deals with Montana public employees' rights to bargain for tenure under the Act. The issue has not been decided by the Montana Supreme Court before, therefore, an examination of the disposition of the issue by other jurisdictions may be helpful.

A Florida District Court of Appeal held in Lake County.

Education Association v. The School Board of Lake County Florida (1976), 360 So. 2d 120, 99 LRRM 2493, that the school Board lacked authority under state law to include a provision in a collective bargaining agreement providing tenure to non-tenured teachers where the state law provided that the Board alone had the power and duty to dismiss its employees. Perhaps as important as the court's decision in Lake County was the following: "This is an issue of first impression in Florida; but the matter has been considered in recent years by a number of other states which authorize public employee bargaining. The authorities are divided." (emphasis added.) The court went on to cite a number of cases in which the court reasoned that the school board could not negotiate an agreement that would establish conditions precedent to the dismissal of nontenured teachers which are in excess of the conditions imposed by statute. It also cited a number of cases in which the courts had reached contrary conclusions, i.e., that the school boards did have the power to contract regarding terms and conditions of employment and that the nonrenewal of a teacher's employment contract and the resolution of labor disputes through binding arbitration were matters relating to terms and conditions of employment. See, for example, Dohoes City School District v. Cohoes Teachers Association, 358 N.E. 2d, 838, 94 LRRM 2192 (1976); Wesslin Education Association v. Board of Education, 331 N.E. 2d 335, 90 LRRM 2442 (1975); Lockport Area Sp. Ed. Coop. v. Lockport Area Sp. Ed. Coop. Assoc., 338 N.E. 2d 463, 91 LRRM 2449 (1975); School Committee of Danvers v. Tyman, 360 N.E. 2d 877, 94 LRRM 3162 (1977); Brown v. Holton Public

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2       Schools, 254 N.W. 2d 41, 95 LRRM 3094 (1977); Board of Education  
3       v. Philadelphia Federation of Teachers Local No. 3, 345 A.2d 35,  
4       90 LRRM 2879 (1975); Danville Board of School Directors v. Fifield,  
5       315 A.2d 473, 85 LRRM 2939 (1974).

6       I am not persuaded by Defendant's arguments on this issue.  
7       nor am I convinced that those jurisdictions which hold their  
8       public employers to be without authority to bargain except on  
9       specifically authorized subjects should be followed in Montana.  
10      When the Collective Bargaining for Public Employees Act was made  
11      law, the public policy of the state was ". . . to encourage the  
12      practice and procedure of collective bargaining . . ." Further,  
13      the Act imposes a duty upon and authorizes both parties to bar-  
14      gain collectively with respect to conditions of employment.  
15      Although the Superintendent of Public Instruction may have been  
16      without authority to enter into an agreement providing tenure to  
17      her employees or to even bargain on the subject prior to the Act,  
18      she does have that authority now. Any other decision would  
19      render public employee collective bargaining meaningless. The  
20      law must mean something when it mandates bargaining on conditions  
21      of employment. And, it can hardly be gainsaid that one's right  
22      to non-summary dismissal is an important condition of employment.

23      I am convinced that the Act implies the authority of Defen-  
24      dant to bargain on the subject of termination for job related  
25      reasons. It is not illegal for the Superintendent to agree to  
26      dismiss employees only for cause and, if there is a dispute as to  
27      what good cause is, to go to an arbitrator for a final and  
28      binding decision. Such practice has been used in the private  
29      sector for a number of years to promote industrial peace. I  
30      believe the public's best interests are served if that is the  
31      policy of this state.

32                          V. CONCLUSION OF LAW

Defendant violated 39-31-401 MAC by refusing to negotiate  
the subject of termination for cause with Complainant.

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2                   VI. RECOMMENDED ORDER

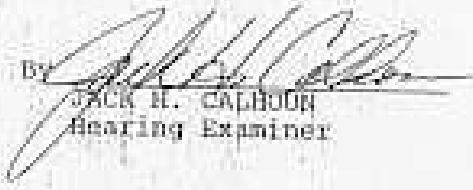
3                   IT IS ORDERED that the Superintendent of Public Instruction,  
4 her officers, agents and representatives shall cease and desist  
5 from refusing to negotiate the above subject with the Montana  
6 Public Employees Association; that ULP 37-79 and charge number  
7 one in ULP 31-79 be dismissed.

8                   NOTICE

9                   Exceptions may be filed to these Findings of Fact, Conclu-  
10 sion of Law and Recommended Order within twenty days of service  
11 thereof. If no exceptions are so filed, this Recommended order  
12 shall become the Final Order of the Board. Exceptions shall be  
13 addressed to the Board of Personnel Appeals, Capitol Station,  
14 Helena, Montana 59601.

15                   Dated this 14th day of April, 1980.

16                   BOARD OF PERSONNEL APPEALS

17                   By 

18                   JACK H. CAPLOUN  
19                   Hearing Examiner